

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 6, 2007

SUZANNE MICHELLE SIMS v. WADE EUGENE SIMS

Appeal from the Circuit Court for Hamilton County
No. 04D1573 L. Marie Williams, Judge

No. E2007-00136-COA-R3-CV - FILED JANUARY 28, 2008

As pertinent to the issues on appeal, the trial court, in this divorce case, designated the plaintiff, Suzanne Michelle Sims (“Mother”), the primary residential parent of the parties’ two minor children; imputed income to Wade Eugene Sims (“Father”) for the purpose of calculating his child support obligation; and ordered Father to pay Mother \$17,200, which amount represents half of the parties’ equity – as found by the trial court – in the former marital residence, which was foreclosed on by Father’s parents after the parties’ separation. Father appeals, challenging the propriety of all of these rulings. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Lisa Z. Bowman, Chattanooga, Tennessee, for the appellant, Wade Eugene Sims.

Charles D. Paty, Chattanooga, Tennessee, for the appellee, Suzanne Michelle Sims.

OPINION

We have reviewed the evidence in this case mindful of our standard of review of a judgment emanating from a bench trial. *See* Tenn. R. App. P. 13(d). With respect to Father’s issue pertaining to the trial court’s designation of Mother as the primary residential parent, we have concluded that the evidence does not preponderate against the trial court’s designation. Accordingly, we hold that Father’s first issue is without merit.

The trial court found that Father was voluntarily underemployed. The evidence does not preponderate against this factual finding. Based upon this finding, the trial court then moved to the issue of Father’s “income potential or earning capacity.” *See* Tenn. Comp. R. & Regs., ch. 1240-2-4-.04(3)(a)(2)(ii)(II). Since there was “no reliable evidence of [Father’s] income potential,” *see* Tenn.

Comp. R. & Regs., ch. 1240-2-4-.04(3)(a)(2)(iv)(I)(II), the trial court did not err when it imputed to Father annual income of \$36,369. See Tenn. Comp. R. & Regs., ch. 1240-2-4-.04(3)(a)(2)(iv)(I)(III).¹ The issue before the trial court was not what Father earned as the operator of a booth at a flea market,² but rather what he *could have earned* if he had pursued employment – in the words of the trial court – “in the employment for which he is trained.” The court was alluding to the fact that Father had an affiliate broker real estate license and a master plumber license.³ We hold that the trial court did not err in its imputation of income to Father for the purpose of calculating his child support obligation.

Father’s final issue is directed at the trial court’s decree that he pay Mother \$17,200. The court’s rationale for its decision is predicated upon the court’s finding that the parties’ marital residence had a net equity value of \$34,400 when the mortgage holders – Father’s parents – foreclosed on the property after the parties’ separation, a separation that prompted Mother to move out of the residence, leaving Father in possession. The court addressed this matter in the judgment of divorce as follows:

The Court finds while in the possession of the parties, the 4610 Molinta Lane property appreciated in value from \$67,000.00 to \$115,000.00 for an increase in value of \$48,000.00. Additionally, the debt was reduced by \$26,400.00. Therefore, Mr. Sims’ parents acquired by the tool of foreclosure a house with a \$74,400.00 equity value to satisfy a \$67,000 debt. There remains \$40,000.00 debt despite the foreclosure. Mr. Sims continues to live in the house.⁴ The shell nature of the transaction is illustrated by the artificial increase in Mr. Sims’ rent from the mortgage amount of \$275.00 to an unpaid rent of \$525.00 per month. The Court finds the foreclosure was a device manipulated by Mr. Sims and his parents to deprive Mrs. Sims of her portion of marital property and to have Mr. Sims and/or his

¹This regulation provides as follows:

Then, in such cases, gross income for the current and prior years shall be determined by imputing annual gross income of thirty-six thousand three hundred sixty-nine dollars (\$36,369) for male parents and twenty-six thousand nine hundred eighty-nine dollars (\$26,989) for female parents. These figures represent the full time, year round workers’ median gross income, for the Tennessee population only, from the American Community Survey of 2004 from the U.S. Census Bureau.

²Father claimed net income of \$650 per month from this flea market booth.

³Father failed to renew the latter license for the year in which the divorce trial was held. He had renewed it for previous years.

⁴When the parties separated, Wife, who had been making the mortgage payment out of her \$35,000 annual gross salary, moved out of the residence with the parties’ children. Father stayed, but thereafter did not make any mortgage payments to his parents.

parents realize the full value of the appreciation in the property and the payments made during the marriage from Mrs. Sims' income. Therefore, the equity of \$74,400.00 shall be divided equally between the parties after deduction of the remaining \$40,000.00 in debt. The debt is assessed to Mr. Sims who is in constructive possession of the residence and living there rent-free. He shall pay to Mrs. Sims \$17,200.00 for her portion of the equity.

(Footnote added). We affirm the trial court's judgment that Father should pay Mother \$17,200, representing one-half of the equity in the marital residence at the time of foreclosure. We do so, however, based upon a different rationale than the one employed by the trial court. We disagree with the court's finding that Father's parents participated in a "shell" transaction. We find insufficient proof of this. The parents, as the mortgage holders, had the right to foreclose upon the property since the mortgage debt was in default. They acted pursuant to law in foreclosing on the property.

Father's action, or, more correctly, his inaction presents a different story. Mother was out of the residence and paying for other habitation. Father was living in the residence and receiving, to the exclusion of Mother, the full benefit of the parties' ownership of the property. He should have been paying the monthly mortgage obligation. Because he failed to do so, the parties' equity was lost. He was guilty of "dissipation of the marital . . . property." Tenn. Code Ann. § 36-4-121(c)(5) (2005). This is supported by the preponderance of the evidence. This "dissipation" finding, in the context of the whole record in this case, justifies the trial court's decision. We are authorized to affirm a judgment of a trial court if we determine that the court reached the right result even though we determine that the result is correct because of a reason other than the one relied upon by the trial court. *Kelly v. Kelly*, 679 S.W.2d 458, 460 (Tenn. Ct. App. 1984). This issue is likewise found adverse to Father.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant Wade Eugene Sims. This case is remanded to the trial court for enforcement of that court's judgment and for collection of costs assessed below, all pursuant to applicable law.

CHARLES D. SUSANO, JR., JUDGE